INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	5
Conclusion	11

CITATIONS

Cases:

Adjmi v. *United States*, 346 F. 2d 654, certiorari denied, 382 U.S. 823	6
Beavers v. *Haubert*, 198 U.S. 77	7
Blachly v. *United States*, 380 F. 2d 665	10
Estes v. *United States*, 335 F. 2d 609, certiorari denied, 379 U.S. 964	6
McFarland v. *United States*, 273 F. 2d 417	10
Milam v. *United States*, 322 F. 2d 104, certiorari denied *sub nom. Kimball* v. *United States*, 377 U.S. 911	6
Pipkin v. *United States*, 243 F. 2d 491	7
Pollard v. *United States*, 352 U.S. 354	7
Reece v. *United States*, 337 F. 2d 852	8
Silverman v. *United States*, 213 F. 2d 405, certiorari denied, 348 U.S. 828	6
United States v. *Debrow*, 346 U.S. 374	6
United States v. *Ewell*, 383 U.S. 116	7, 9

383-256—70

Constitution, statutes and rule:

United States Constitution:

	Page
Fifth Amendment	2
Sixth Amendment	2, 7
Federal Mail Fraud Statute, 18 U.S.C. 1341	1, 2, 6, 9
Federal Rules of Criminal Procedure:	
Rule 7(c)	2
Rule 21(b)	4

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1353

DORY AUERBACH AND IRVING GOTTLIEB,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1–6) is reported at 420 F. 2d 921.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1969 (Pet. App. 7–8). Petitions for rehearing were denied on February 26, 1970 (Pet. App. 9–10). On March 26, 1970, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment charging petitioners with violating the Federal Mail Fraud Statute, 18

U.S.C. 1341, was so vague and indefinite as to fail to meet the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure and deprive petitioners of their constitutional rights under the Fifth and Sixth Amendments.

2. Whether petitioners were denied their Sixth Amendment right to a speedy trial.

3. Whether the evidence was sufficient to sustain the conviction of the petitioner Gottlieb.

STATEMENT

A 22-count indictment filed on March 14, 1963, in the United States District Court for the District of Arizona charged petitioners and one David Prosser Randell with mail fraud in violation of 18 U.S.C. 1341 (Pet. App. 11–20) in connection with offers to the public to sell certain real estate located in Mohave County, Arizona (R. 2572, 2585–2601). The indictment alleged petitioners and Randell were officers, directors and stockholders of Lake Mead Rancheros, Inc.—a Delaware corporation licensed to transact business and having mailing addresses in Kingman, Arizona but with principal offices in Florida—and were actively engaged in the business of that corporation (Pet. App. 11).

Prior to July 13, 1961, and continuing to the return of the indictment, petitioners and Randell are alleged to have devised and entered into a scheme to defraud prospective land purchasers (Pet. App. 12–14) by inducing them through newspaper publications and mailings of deceptive advertising literature to pur-

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chase lots falsely and fraudulently represented to be fine investments, located just a few miles from Kingman on a through route to Lake Mead near Lake Mead and Lake Mohave (Pet. App. 15–16), equipped with complete utility services for electricity, water and phones (Pet. App. 17–19) and "ready for immediate living" (Pet. App. 19). The indictment alleged that petitioners and Randell, as part of their scheme to defraud, mailed to prospective purchasers a falsely labeled photograph showing land with a power line existing thereon (Pet. App. 19–20), and that they failed in their advertising to disclose the corporation's subdivision units consisted only of odd-numbered sections of land in a checkerboard pattern in an area where all the even-numbered sections of land were owned by the federal government for grazing purposes (Pet. App. 20). In a general description of the scheme, it was alleged that petitioners and Randell caused the Kingman, Arizona mailing addresses of Lake Mead Rancheros, Inc. to be used in advertising the sale of available lots so that prospective purchasers would believe they were dealing with a company headquartered in Arizona; in fact, mail addressed to and received in Kingman was not processed there, "but forwarded to Lake Mead Rancheros, Inc. at Hollywood, Florida, or Miami, Florida" (Pet. App. 14–15). Each count of the indictment charged petitioners and Randell with knowingly causing a separate interstate mailing of a check by a purchaser from a point in the United States to Kingman, Arizona (Pet. App. 20).

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On August 16, 1963, petitioners and Randell moved pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure for an order transferring the cause to the United States District Court for the Southern District of Florida (R. 2613). The motion was initially denied on November 18, 1963 (see Docket Entries), but, on rehearing (July 27, 1964), it was granted and the government was ordered to file a bill of particulars (R. 2698, 2700, 2707).[1] On February 26, 1965, Judge Charles B. Fulton of the United States District Court for the Southern District of Florida retransferred the case *sua sponte* to the United States District Court for the District of Arizona (R. 2715-2716).[2] The Court of Appeals for the Fifth Circuit (Judge Brown dissenting) dismissed an appeal from Judge Fulton's order as interlocutory (R. 2763, 347 F.2d 742 (C.A. 5)), and this Court denied certiorari

[1] Visiting Judge William C. Mathes (of California) sitting in the Arizona district ordered the government to file a bill of particulars stating wherein certain representations were claimed to be false and fraudulent, but he denied a motion for a bill of particulars as to whether the offense occurred in more than one jurisdiction, noting that this was a question of law (R. 2698, 2700, 2707). The bill of particulars was filed on October 2, 1964.

[2] Judge Fulton concluded, after careful inspection of the indictment and the recently filed bill of particulars, that there was no allegation that material was either posted from or received in the Southern District of Florida. He noted that the allegation stating the purported fraud involved forwarding material to Florida did not charge that the mails were used in the process, and for "these reasons" the cause was being transferred (R. 2175-2176).

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on December 13, 1965 (R. 2836, 382 U.S. 958). A petition for a writ of mandamus filed in the court of appeals was denied on January 5, 1966.

On October 6, 1966, petitioners and Randell filed a new motion seeking to retransfer the case to the United States District Court for the Southern District of Florida (R. 2770), which motion was granted by the Arizona district court on December 13, 1966 (R. 2773). Following assignment to a trial judge (R. 2774) and pre-trial conference (R. 2775–2777), notice was entered on July 28, 1967 (R. 2778) setting the case for trial on January 29, 1968. On December 11, 1967, a motion was made to dismiss for lack of speedy trial (R. 2800) and was denied (R. 2994).

The case was tried without a jury and petitioners and co-defendant Randell were found guilty on all counts. On June 14, 1968, the court sentenced petitioner Auerbach to concurrent prison terms of one year on each of counts 1 through 22 inclusive, suspended sentence, placed him on a probation for three years and ordered him to pay a $10,000 fine (R. 3045); the court sentenced petitioner Gottlieb to concurrent prison terms of six months on each of counts 1 through 22 inclusive, suspended sentence, placed him on probation for three years, and ordered him to pay a $5,000 fine (R. 3047). On appeal the convictions were affirmed (Pet. App. 1–8) and petitions for rehearing were denied (Pet. App. 9–10).

ARGUMENT

1. Petitioners challenge the indictment as being insufficient in that it does not inform the accused in

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precise detail why and in what factual respects the allegedly deceptive advertising literature was false or fraudulent. This contention fails to focus on the only two essential elements of a violation of 18 U.S.C. 1341: (1) a scheme to defraud and (2) use of the mails to effect this scheme. *Adjmi* v. *United States,* 346 F.2d 654, 657 (C.A. 5), certiorari denied, 382 U.S. 823. As pointed out by the court of appeals (Pet. App. 3), the "indictment in this case clearly alleges both of these elements." Since the scheme alleged need not be fraudulent on its face but merely need be reasonably calculated to deceive, *Silverman* v. *United States,* 213 F.2d 405, 407 (C.A. 5), certiorari denied, 348 U.S. 828, it is not necessary that the indictment particularize specific false or fraudulent representations. To do so would constitute the pleading of evidentiary facts which is not required. *Milam* v. *United States,* 322 F.2d 104, 108–109 (C.A. 5), certiorari denied *sub nom. Kimball* v. *United States,* 377 U.S. 911. As the opinion below succinctly concludes: "Short of pleading evidence, which is not required, we do not see how an indictment could possibly be more specific than the one involved here" (Pet. App. 3). Clearly, enough was alleged to enable petitioners "to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense", *United States* v. *Debrow,* 346 U.S. 374, 378, and petitioners were "adequately protected * * * against any surprise from the proof presented by the Government" (Pet. App. 3). See *Estes* v. *United States,* 335 F.2d 609, 619 (C.A. 5), certiorari denied, 379 U.S. 964.

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Petitioners contend that the government's bill of particulars, requested by petitioners and filed October 2, 1964 pursuant to court order, improperly amended the original indictment and was, in effect, tantamount to a superseding indictment. It was, so petitioners argue, an effort by the government to cure defects in the original indictment through "the guise of a bill of particulars" (Pet. 34). Such a position presupposes deficiencies in the original indictment which did not exist in this case. Here, the bill of particulars merely served its legitimate function of "better appris[ing] the defendant of what he is expected to meet," *Pipkin* v. *United States*, 243 F.2d 491, 494 (C.A. 5), and, as recognized by the court of appeals, "did not supplement or change or affect the indictment" (Pet. App. 4). Petitioners can hardly complain because the government furnished the specific information they themselves requested in their motion for a bill of particulars.

2. Petitioners' contention that they were denied their right to a speedy trial as guaranteed by the Sixth Amendment is equally without merit. Such a right is necessarily relative and depends upon the circumstances of the particular case. *United States* v. *Ewell*, 383 U.S. 116; *Pollard* v. *United States*, 352 U.S. 354; *Beavers* v. *Haubert*, 198 U.S. 77. Much is made here of the four years and nine months which elapsed between the date of arraignment (April 29, 1963) in this case and the commencement of trial (January 29, 1968) (Pet. 9–15). But, as petitioners correctly assert, "[t]ime is but one factor to be considered in a case

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such as this" (Pet. 15). Consideration must also be given to other factors: (1) the reasons for the delay, (2) the prejudice to petitioners occasioned by the delay and (3) whether petitioners have waived their right to a speedy trial (Pet. App. 4–5).

Here, petitioners concede (Pet. 9) the major delays were brought on by their own motion in the Arizona District Court (August 16, 1963) for a change of venue to the Southern District of Florida. After the motion was granted on rehearing (July 27, 1964), the Florida District Court *sua sponte* ordered the case to be retransferred (February 26, 1965) to Arizona. Petitioners unsuccessfully appealed this order to the court of appeals (June 18, 1965) and, subsequently, were denied respective petitions for a writ of certiorari (December 13, 1965) and for a writ of mandamus (January 5, 1966). Thereafter they succeeded, however, in moving the Arizona District Court (December 13, 1966) to return the case to the Southern District of Florida.

Notwithstanding they were responsible for all the transfer proceedings, petitioners attribute responsibility for delays occasioned thereby to the government on the ground that the government's initial selection of the Arizona forum was improper. In attempting to demonstrate such delays were "purposeful and oppressive," see *Reece* v. *United States*, 337 F.2d 852, 853 (C.A. 5), they point to the government's continued opposition to their motions and appeals as being unwarranted (Pet. 18), apparently in complete disregard of the regularity with which the courts upheld the gov-

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ernment's position. Such arguments overlook the fact that business activities of the petitioners occurred in Kingman, Arizona, and correspondence and checks were mailed interstate to and were received in Kingman (Pet. App. 4). Certainly such contacts with the original forum state support an initial decision to bring an indictment for violations of the Federal Mail Fraud Statute in Arizona. Further, as noted by the court below, the "record affirmatively discloses that the delays in this case were not caused by any arbitrary, capricious, vexatious, oppressive, deliberate, or negligent conduct on the part of the Government"[3] (Pet. App. 5).

Nor do petitioners demonstrate they suffered serious prejudice in defending themselves as a consequence of these delays. See *United States* v. *Ewell, supra* at 120. Their only contention in this regard (Pet. 18–19) is that certain letters written between 1963 and 1965 from co-defendant Randell to petitioner Auerbach were available to the government after 1967 for use in its cross-examination of Randell at trial. These letters, however, dealt only with the

[3] As to petitioners' claim that there existed prolonged periods of delay between the actual court hearings on the venue issue (including appeals) which were unrelated to the litigation and were due to "the request of the prosecution * * * government inaction, or mere dormancy of the file" (Pet. 9), the court of appeals quite correctly pointed out that such delays were an inevitable outgrowth of petitioners' own motions and appeals. "Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon" (Pet. App. 5).

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routine operations of corporate business and were not even objected to by petitioners when introduced into evidence at trial (R. 2319–2334, 2385; Gov. Ex. 66). Indeed, defense counsel stated to the court that he had "no serious objection" to the letters which he expressly characterized as being "so self-serving that we could never get this in [in the defendants' case]" (R. 2386).

3. Petitioner Gottlieb contends (Pet. 35–41) the evidence at trial was insufficient as a matter of law to sustain his conviction and seeks reversal of the district judge's denial of his motion for judgment of acquittal. As pointed out by the court below (Pet. App. 5–6), in considering Gottlieb's motion the district judge was required to view the evidence in the light most favorable to the government (*Blachly* v. *United States*, 380 F.2d 665 (C.A. 5); *McFarland* v. *United States*, 273 F.2d 417 (C.A. 5)), and to consider all the inferences reasonably to be drawn from the facts.

Viewed in this light, the testimony introduced at trial by the government reflected beyond a reasonable doubt that Gottlieb had a close working relationship with both petitioner Auerbach and co-defendant Randell, that he knew about the scheme alleged and that he actively participated in the implementation of that scheme. For example, testimony revealed Gottlieb was the secretary-treasurer and a stockholder of Lake Mead Rancheros, Inc. (R. 1355). Petitioner Auerbach, the corporation's president, referred to Gottlieb as his "right hand man" (R. 159). Gottlieb sat in on dis-

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cussions regarding the placing of newspaper advertisements on behalf of the corporation (R. 232–233). He was the general office manager and overseer of work in the principal office (R. 950). He dictated letters answering customer inquiries regarding the nature of the corporation's lots (R. 951, 963). Significantly, it was Gottlieb who made the decision to issue warranty deeds in the wash areas (those areas shown to be unsuitable for development; see R. 78, 83–84) instead of transferring customers to an area not in the wash area (R. 979). This and other testimony indicating Gottlieb's awareness of and participation in the venture (see R. 995–996, 1005, 1018) amply support the rulings of both courts below upholding his conviction.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1970.

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